

Mar 13, 2020

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

VENERANDA B., o/b/o AGB, a minor  
child.,<sup>1</sup>

Plaintiff,

v.

ANDREW M. SAUL, the Commissioner  
of Social Security,<sup>2</sup>

Defendant.

No. 4:19-CV-5074-EFS

**ORDER GRANTING PLAINTIFF'S  
SUMMARY-JUDGMENT MOTION  
AND DENYING DEFENDANT'S  
SUMMARY-JUDGMENT MOTION**

Before the Court are the parties' cross summary-judgment motions. ECF  
Nos. 11 & 12. Plaintiff Veneranda B. brings this lawsuit on behalf of her minor

---

<sup>1</sup> To protect the privacy of the adult social-security Plaintiff, the Court refers to her  
by first name and last initial or by "Plaintiff," and refers to the minor child by her  
initials. *See* LCivR 5.2(c).

<sup>2</sup> Andrew M. Saul is now the Commissioner of the Social Security Administration.  
Accordingly, the Court substitutes Andrew M. Saul as the Defendant. *See* Fed. R.  
Civ. P. 25(d).

1 child AGB to appeal a denial of childhood disability benefits by the Administrative  
2 Law Judge (ALJ). Plaintiff alleges the ALJ erred by 1) failing to obtain a full case  
3 evaluation by a medical expert; 2) ignoring lay testimony from AGB's teacher; 3)  
4 improperly discounting the mother's testimony; and 4) improperly assessing the  
5 childhood domains. In contrast, Defendant Commissioner of Social Security asks  
6 the Court to affirm the ALJ's decision finding AGB not disabled. After reviewing  
7 the record and relevant authority, the Court grants Plaintiff's Motion for Summary  
8 Judgment, ECF No. 11, and denies Defendant's Motion for Summary Judgment,  
9 ECF No. 12.

#### 10 **I. Three-Step Childhood Disability Determination**

11 To qualify for Title XVI supplement security income benefits, a child under  
12 the age of eighteen must have "a medically determinable physical or mental  
13 impairment, which results in marked and severe functional limitations, and which  
14 can be expected to result in death or which has lasted or can be expected to last for  
15 a continuous period of not less than 12 months."<sup>3</sup> The regulations provide a three-  
16 step process to determine whether a child satisfies the above criteria.<sup>4</sup> First, the  
17 ALJ determines whether the child is engaged in substantial gainful activity.<sup>5</sup>  
18 Second, the ALJ considers whether the child has a "medically determinable  
19

---

20 <sup>3</sup> 42 U.S.C. § 1382c(a)(3)(C)(i).

21 <sup>4</sup> 20 C.F.R. § 416.924(a).

22 <sup>5</sup> *Id.* § 416.924(b).

1 impairment that is severe,” which is defined as an impairment that causes “more  
2 than minimal functional limitations.”<sup>6</sup> Finally, if the ALJ finds a severe  
3 impairment, the ALJ must then consider whether the impairment “medically  
4 equals” or “functionally equals” a disability listed in the “Listing of Impairments.”<sup>7</sup>

5 If the ALJ finds that the child’s impairment or combination of impairments  
6 does not meet or medically equal a listing, the ALJ must determine whether the  
7 impairment or combination of impairments functionally equals a listing.<sup>8</sup> The  
8 ALJ’s functional-equivalence assessment requires the ALJ to evaluate the child’s  
9 functioning in six “domains.” These six domains, which are designed “to capture all  
10 of what a child can or cannot do,” are:

- 11 (1) acquiring and using information;
- 12 (2) attending and completing tasks;
- 13 (3) interacting and relating with others;
- 14 (4) moving about and manipulating objects;
- 15 (5) caring for self; and
- 16 (6) health and physical well-being.<sup>9</sup>

---

19 <sup>6</sup> *Id.* § 416.924(c).

20 <sup>7</sup> *Id.* § 416.924(c)-(d).

21 <sup>8</sup> *Id.* § 416.926a(a).

22 <sup>9</sup> *Id.* § 416.926a(b)(1)(i)-(vi).

1 A child's impairment is deemed to functionally equal a listed impairment if the  
2 child's condition results in a "marked" limitations in two domains, or an "extreme"  
3 limitation in one domain.<sup>10</sup> An impairment is a "marked limitation" if it "interferes  
4 seriously with [a child's] ability to independently initiate, sustain, or complete  
5 activities."<sup>11</sup> An "extreme limitation" is defined as a limitation that "interferes very  
6 seriously with [a person's] ability to independently initiate, sustain, or complete  
7 activities."<sup>12</sup>

## 8 **II. Factual and Procedural Summary**

9 On September 11, 2015, Plaintiff filed a Title XVI application for childhood  
10 disability benefits for AGB.<sup>13</sup> The claim was denied initially and upon  
11 reconsideration.<sup>14</sup> An administrative hearing was held before Administrative Law  
12 Judge Larry Kennedy in August 2017.<sup>15</sup>

---

14 <sup>10</sup> *Id.* § 416.926a(a).

15 <sup>11</sup> *Id.* § 416.926a(e)(2)(i).

16 <sup>12</sup> *Id.* § 416.926a(e)(3)(i).

17 <sup>13</sup> AR 236-42. Plaintiff also previously filed a Title XVI application on January 6,  
18 2015. AR 231-35. This claim was denied at the initial determination level in June  
19 2015. Plaintiff did not appeal that denial and therefore that decision was final. AR  
20 21.

21 <sup>14</sup> AR 107-30, 136-39, & 143-46.

22 <sup>15</sup> AR 51-96.

1 In denying the disability claim, the ALJ made the following findings:

- 2 • Plaintiff was a school-age, adolescent child when the application was  
3 filed;
- 4 • Step one: Plaintiff had not engaged in substantial gainful activity  
5 since September 11, 2015, the application date, which is considered  
6 the alleged onset date;
- 7 • Step two: Plaintiff has the following medically determinable severe  
8 impairments: anxiety, learning disorder, receptive and expressive  
9 language disorder, developmental delay disorder, cognitive disorder,  
10 headaches, and asthma with allergic rhinitis; and
- 11 • Step three: Plaintiff does not have an impairment or combination of  
12 impairments that met, or medically or functionally equaled, the  
13 severity of one of the listings.<sup>16</sup>

14 When assessing the medical-opinion evidence, the ALJ gave partial weight  
15 to the opinions of the State agency consultants at the initial and reconsideration  
16 stages (Sharon Underwood, Ph.D., Nevine Makari, M.D., Edward Beaty, Ph.D., and  
17 Charles Wolfe, M.D.) and the testifying medical expert Stephen Rubin, Ph.D.<sup>17</sup> The  
18

---

19  
20 <sup>16</sup> AR 15-41 (Pages 8 and 9, AR 28 & 29, of the ALJ's decision are swapped in the  
21 record).

22 <sup>17</sup> AR 29.  
23

1 ALJ also gave little weight to the opinion of AGB's fifth grade teacher Arianne  
2 Wolcik and to the testimony of AGB's mother.<sup>18</sup>

3 Plaintiff requested review of the ALJ's denial by the Appeals Council, which  
4 denied review.<sup>19</sup> Plaintiff timely appealed to this Court.

### 5 **III. Standard of Review**

6 A district court's review of the Commissioner's final decision is limited.<sup>20</sup> The  
7 Commissioner's decision is set aside "only if it is not supported by substantial  
8 evidence or is based on legal error."<sup>21</sup> Substantial evidence is "more than a mere  
9 scintilla but less than a preponderance; it is such relevant evidence as a reasonable  
10 mind might accept as adequate to support a conclusion."<sup>22</sup> Moreover, because it is  
11 the role of the ALJ and not the Court to weigh conflicting evidence, the Court  
12 upholds the ALJ's findings "if they are supported by inferences reasonably drawn  
13 from the record."<sup>23</sup> The Court considers the entire record as a whole.<sup>24</sup>

---

14  
15 <sup>18</sup> AR 28-29.

16 <sup>19</sup> AR 1-5.

17 <sup>20</sup> 42 U.S.C. § 405(g).

18 <sup>21</sup> *Hill v. Astrue*, 698 F.3d 1153, 1158 (9th Cir. 2012).

19 <sup>22</sup> *Id.* at 1159 (quoting *Sandgathe v. Chater*, 108 F.3d 978, 980 (9th Cir. 1997)).

20 <sup>23</sup> *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012).

21 <sup>24</sup> *See Lingenfelter v. Astrue*, 504 F.3d 1028, 1035 (9th Cir. 2007) (The court "must  
22 consider the entire record as whole, weighing both the evidence that supports and  
23

1 Further, the Court may not reverse an ALJ decision due to a harmless  
2 error.<sup>25</sup> An error is harmless “where it is inconsequential to the [ALJ’s] ultimate  
3 nondisability determination.”<sup>26</sup> The party appealing the ALJ’s decision generally  
4 bears the burden of establishing harm.<sup>27</sup>

#### 5 IV. Analysis

##### 6 A. Required Case Evaluation: Plaintiff established consequential error.

7 Plaintiff argues the ALJ erred by failing to obtain a case evaluation of the  
8 entire record by a medical expert as is required by *Howard ex rel. Wolff v.*  
9 *Barnhart*, 341 F.3d 1006, 1014 (9th Cir. 2003); Acquiescence Ruling (AR) 04-1(9);  
10 and 42 U.S.C. § 1382c(a)(3)(1). The Commissioner argues the ALJ satisfied his  
11 case-evaluation responsibility by having Dr. Stephen Rubin testify as the medical  
12 examiner at the hearing. In addition, the Commissioner relies on the record review  
13 completed by the four State agency consultants.

14  
15  
16 the evidence that detracts from the Commissioner's conclusion,” not simply the  
17 evidence cited by the ALJ or the parties.); *Black v. Apfel*, 143 F.3d 383, 386 (8th  
18 Cir. 1998) (“An ALJ's failure to cite specific evidence does not indicate that such  
19 evidence was not considered[.]”).

20 <sup>25</sup> *Molina*, 674 F.3d at 1111.

21 <sup>26</sup> *Id.* at 1115 (quotation and citation omitted).

22 <sup>27</sup> *Shinseki v. Sanders*, 556 U.S. 396, 409-10 (2009).

1 An ALJ is required to “make reasonable efforts to ensure that a “qualified  
2 pediatrician or other individual who specializes in a field of medicine appropriate  
3 to the disability of the individual (as determined by the Commissioner of Social  
4 Security) evaluates the case of such individual.”<sup>28</sup> The Ninth Circuit interpreted  
5 this “to mean that the ALJ is required to make reasonable efforts to obtain a case  
6 evaluation, based on the record in its entirety, from a pediatrician or other  
7 appropriate specialist, rather than simply constructing his own case evaluation  
8 from the evidence in the record.”<sup>29</sup> Following *Howard*, the Social Security  
9 Administration issued AR 04-1(9), which states:

10 To satisfy this requirement, the ALJ . . . may rely on case evaluation  
11 made by a State agency medical or psychological consultant that is  
12 already in the record, or the ALJ. . . may rely on the testimony of a  
13 medical expert. When the ALJ relies on the case evaluation made by a  
14 State agency medical or psychological consultant, the record must  
15 include the evidence of the qualifications of the State agency medical  
16 or psychological consultant.<sup>30</sup>

---

16 <sup>28</sup> 42 U.S.C. § 1382c(a)(3)(l).

17 <sup>29</sup> *Howard*, 341 F.3d at 1014 & n.2 (“There is a distinction . . . between having an  
18 expert evaluate a claimant with respect to that expert’s particular specialty, and  
19 having an expert evaluate a claimant’s case in its entirety, considering all of the  
20 medical records and determining whether those indicate that the claimant is  
21 disabled within the meaning of the Social Security Act.”).

22 <sup>30</sup> 2004 WL 875081, 69 Fed. Reg. at \*22580 (2004).



1 Here, while there is no dispute that AR 04-01(9)'s case-evaluation  
2 requirement applies, the ALJ did not indicate he relied on AR 04-1(9) or indicate  
3 which expert's evaluation he relied on under AR 04-1(9). The Court finds,  
4 notwithstanding Dr. Rubin's testimony and the case reviews completed by the  
5 agency consultants, the ALJ failed to satisfy his case-evaluation responsibilities.

6 1. Dr. Rubin

7 The Commissioner argues that the ALJ satisfied the case-evaluation  
8 requirement by calling Dr. Rubin. However, this argument is not persuasive for  
9 several reasons. First, Dr. Rubin, as a psychologist was only qualified to testify as  
10 to AGB's mental health and resulting limitations, not her physical impairments  
11 and resulting limitations (except to the extent they impacted her mental health).<sup>31</sup>  
12 No medical expert who reviewed the entire case record offered an opinion as to  
13 AGB's limitations resulting from her asthma with allergic rhinitis and chronic  
14

---

15 <sup>31</sup> See AR 74 (Dr. Rubin testified, "I focused mostly on intellectual testing and  
16 psychological."); *see also Fithian v. Berryhill*, No. 3:16-cv-932-SI, 2017 WL 1502801,  
17 at \*8 (D. Or. Apr. 26, 2017) ("[A]ll psychiatrists are M.D.'s, and although some  
18 psychiatrists may treat or specialize in physical impairments, not all do. Thus the  
19 mere fact that Dr. Jones is an M.D. does not mean her physical-limitation opinion  
20 deserves controlling weight."); *Williams v. Colvin*, No. 2:14-cv-00213-FVS, 2015 WL  
21 5039911, at \*8 (E.D. Wash. Aug. 26, 2015) (finding physical limitations were  
22 beyond the expertise of psychologist).  
23

1 headaches. These physical conditions impacted her ability to attend and perform at  
2 school.<sup>32</sup> This impact was recognized by AGB's Individual Education Plan (IEP)  
3 team:

4 [AGB's] medical conditions can manifest with social/emotional  
5 symptoms that have an adverse impact on her learning and success at  
6 school. She experiences anxiety that results in headaches or  
7 abdominal pain and sleep difficulties. Asthma and Alpha 1  
8 Antitrypsin also reduce her stamina and ability to cope with the  
demands of school. [AGB] may benefit from a less demanding  
academic program in order to provide her with more support, reduce  
her stress levels, and decrease the strain on her health.<sup>33</sup>

---

9 <sup>32</sup> See, e.g., AR 1094 (Dr. Wendy Eastman: "I suspect that her headaches are  
10 related to difficulty sleeping and anxiety related to school. Since she has difficulty  
11 sleeping and daily headaches that continue to worsen, I recommend starting a  
12 daily headache preventative medication now to help her feel better. This Daily  
13 Preventative Medication will not treat the anxiety or stress related to school but  
14 will help with sleep and hopefully decrease some of the hypersensitization. If she  
15 continues to struggle with anxiety, I would recommend PCP to evaluate to see if  
16 she may benefit from an anti-anxiety medication to help with anxiety and possible  
17 sensory issues related to her developmental delays."); AR 1131-71 (Public records  
18 summarizing medical care appointments); AR 1128 (noting approximately sixteen  
19 absences from school during sixth grade); AR 267 & 272 (Fourth grade teacher  
20 noted that AGB's "continuous absences ["due to illness or at dr. appointments"]  
21 hurt her academic progress.").

22 <sup>33</sup> AR 1112.

1  
2 This record requires the testimony of a medical expert relating to Plaintiff's  
3 physical impairments and resulting limitations.<sup>34</sup>

4 Second, after Dr. Rubin reviewed the file for the administrative hearing,  
5 Plaintiff submitted additional educational records: AGB's sixth grade report card  
6 and the IEP created for AGB's seventh grade year.<sup>35</sup> These educational records are  
7 material to Plaintiff's position that AGB's intellectual disability impacts her ability  
8 to acquire and use information and attend to and complete tasks. For instance, in  
9 sixth grade, AGB earned one F, three Ds, one C, and one A, with the A being  
10 earned in a very basic reading class.<sup>36</sup> In addition, Plaintiff's sixth-grade teachers  
11 noted that AGB "did not use class time constructively," "frequently did not  
12 complete or do the assignments on time," and that her "poor attendance effects  
13 grade."<sup>37</sup> These comments support the mother's reports, as well as teacher and  
14 doctor reports, that AGB's academic abilities were hindered by her intellectual

---

15  
16 <sup>34</sup> See 20 C.F.R. § 416.924a(b)(7)(v) ("We will consider how your temporary removal  
17 or absence from the [education] program [due to your impairment] affects your  
18 ability to function compared to other children your age who do not have your  
19 impairments.").

20 <sup>35</sup> AR 371-89 & 1105-49.

21 <sup>36</sup> AR 1111 & 1127-28.

22 <sup>37</sup> AR 1128.  
23

1 disabilities, as well as her physical conditions of asthma, allergies, and chronic  
2 headaches—the latter being related to the academic anxiety that AGB suffers as a  
3 result of not being able to accomplish assignments in a timely manner.<sup>38</sup> Moreover,  
4 the record reflects that the cause of the delay of submitting these records to the  
5 ALJ were caused by the school’s nonresponse to records requests and the time for  
6 reassessing the need for an IEP.<sup>39</sup> These educational records were material  
7  
8  
9

---

10 <sup>38</sup> See, e.g., AR 268 (Yara Palomarez: finding a “very serious problem” with  
11 completing class/homework assignments and working at a reasonable  
12 pace/finishing on time”); AR 642 (Dr. Peter Holden: “History of developmental  
13 delay with a learning disorder consistent with intellectual disability.”); AR 1060  
14 (Dr. Timothy Jordan: “[I]n testing today, she had particular difficulty with active  
15 working memory. This is a type of memory needed for mathematics and other  
16 subjects. Children have to learn to hold information [in] their head while they do  
17 something else and then come back to the original piece of information. This is  
18 particularly necessary in long division in math.”); AR 1118 (IEP: “[H]er math  
19 disability is more severe than would be accounted for by her health conditions and  
20 supports an additional eligibility category of Specific Learning Disability.”).

21 <sup>39</sup> See AR 56 (reporting that records were requested from the school district in July  
22 2017, and a follow-up request was also made); AR 368; *see also* AR 1077 & 1094.  
23

1 documents that Dr. Rubin needed to review to determine if it altered his opinion. A  
2 supplemental hearing was needed.<sup>40</sup>

3 Finally, assuming that the record was sufficiently complete at the time Dr.  
4 Rubin reviewed the record, Dr. Rubin testified that he was unable to review a  
5 significant portion of the then-current record:

6 I have to admit, I had some trouble reading that very large file in 23F.  
7 I read some of it and couldn't actually read others. . . . I don't know if  
8 it's my computer or the extensiveness of the record. . . . I did not read  
that. . . . So, we don't have the latest updates, the photo gallery. So, I  
have to admit that I did not read all of the 147 pages.<sup>41</sup>

9 The ALJ's subsequent brief summary of one of the medical records authored by  
10 Timothy Jordan, M.D.—only 6 pages out of 147 pages—was not sufficient to  
11 constitute a review of the full record by Dr. Rubin.<sup>42</sup> The non-reviewed portion of  
12 the record contained the vast majority of AGB's medical records after January 5,  
13

---

14 <sup>40</sup> Likewise, the ALJ commented during the hearing: "I then have the hearing, I  
15 take the testimony, I go back through the records again after the hearing, hold the  
16 record open to see if there's anything additional that comes in, I'll review that. And  
17 then I'll decide the case and let, if these new records, if there's any issues that come  
18 up, I may need supplemental proceedings." AR 94.

19 <sup>41</sup> AR 68-69; *see also* AR 29 ("Dr. Rubin was able to review the claimant's medical  
20 and school records, though he testified that he could not review the entire record  
21 due to computer problems.").

22 <sup>42</sup> AR 69-71 & 1056-61.  
23

1 2016, including medical records from AGB's treating doctors, Dr. Samuel Pai-Sun  
2 Yang, who opined that AGB's learning problems were likely related to birth  
3 asphyxia and that "[s]pecial education based on thorough neuropsychologic testing  
4 should be a priority," and Dr. Wendy Eastman's findings that AGB suffers chronic  
5 daily headaches due to "anxiety related to academic stress" and "[s]he is clearly not  
6 getting the extra academic support she needs at school."<sup>43</sup> These records support  
7 the mother's testimony that she struggled to get the schools to respond to AGB's  
8 educational challenges, and that it was not until the mother received assistance  
9 from a social worker, at the behest of the treating medical providers, to navigate  
10 the school's systemic requirements, that an IEP was developed. Moreover, that  
11 AGB's academic performance steadily declined as she moved up in grade levels and  
12 was expected to perform more tasks that demanded active-working memory skills  
13 is consistent with her mental impairments.

---

14  
15 <sup>43</sup> AR 958-1104; *see also* AR 1077 ("We advised the family to focus on practical  
16 steps that will help [AGB] in terms of receiving special education services. This  
17 was also advised previously by Dr. Holden and Dr. Jordan but the local school  
18 district has not been very responsive in evaluating her with the appropriate  
19 neuropsychologic tests. Advocacy services through the ARC may be necessary and  
20 contact information was provided to the family.") & AR 1094 ("Providence Social  
21 Worker has been notified and are working with mother and schools. Hopefully they  
22 can get better services in place for the next academic year.").

1           On this record, Dr. Rubin’s review does not constitute a case evaluation of  
2 the entire record as required by *Howard* and AR 04-1(9).

3           2.     State Agency Consultants

4           The initial reviewing consultants, Sharon Underwood, Ph.D. and Nevine  
5 Makari, M.D., reviewed the record in 2015.<sup>44</sup> The reconsideration reviewing  
6 consultants, Charles Wolfe, M.D. and Edward Beaty, Ph.D., reviewed the record in  
7 January 2016.<sup>45</sup> Accordingly, each of these case evaluations were done well before  
8 the August 2017 ALJ hearing. Following these case reviews, medical records  
9 reveal, in part, continued treatment for AGB’s asthma, chromosomal testing  
10 indicating that AGB’s duplicate genomic material at the P-arm of the X  
11 chromosome within the 22.31 band was likely not contributing to her  
12 developmental delay, that Dr. Yang determined that Plaintiff’s developmental  
13 difficulties were likely due to birth difficulties, that there was still no explanation  
14 for the moderate elevation of sweat chloride on two different testing occasions,  
15 AGB suffered chronic headaches, and AGB received poor grades in sixth grade, and  
16 an IEP was developed for AGB in seventh grade.<sup>46</sup> Given the significant  
17 development of the medical and educational record since the State agency

---

18  
19 <sup>44</sup> AR 112-17.

20 <sup>45</sup> AR 128-30.

21 <sup>46</sup> AR 112-17, 125-30, 371-89, 815-21, 899-916, 929-48, 1006-27, 1033-54, 1056-61,  
22 1063-67, 1077-78, 1087-93, & 1094-1128.  
23

1 consultants conducted their review, these reviews cannot constitute the full-record  
2 evaluation required by *Howard* and AR 04-1(9).

3         Moreover, the record does not contain the qualifications of the State agency  
4 consultants. AR 04-1(9) requires the record to “include the evidence of the  
5 qualifications of the State agency medical or psychological consultant.” The  
6 Commissioner argues that the reference to each doctor’s area of practice (and  
7 related assigned medical specialty code) constitutes the required qualifications  
8 information. This information is not sufficient to constitute the required  
9 qualifications information. Section 1382c(a)(3)(I) requires “a *qualified* pediatrician  
10 or other individual who specializes in a field of medicine appropriate to the  
11 disability of the individual” to evaluate the record.<sup>47</sup> Accordingly, the record must  
12 contain evidence that not only is that individual a pediatrician or otherwise  
13 specialized in a relevant field of medicine but also that the individual is *qualified*.  
14 To determine whether a pediatrician or other specialist is qualified to render an  
15 opinion as to a child claimant’s impairment(s) requires more information than the  
16 doctor’s name and medical specialty.

17         Based on this record, the ALJ erred as a matter of law and this error was  
18 consequential. The information submitted by Plaintiff following the hearing was  
19 new and material evidence for which the ALJ ought to have reopened the hearing  
20 and taken additional testimony from a qualified medical expert who reviewed the  
21

---

22 <sup>47</sup> 42 U.S.C. § 1382c(a)(3)(I).  
23



1 entire file before issuing his decision.<sup>48</sup> Remand is required so that the full case  
2 evaluation is conducted by a qualified pediatrician or other specialist as to AGB's  
3 physical and mental impairments—not solely the ALJ himself.

4 **B. Other Issues**

5 Plaintiff also argued the ALJ erred by discounting AGB's mother's  
6 testimony; ignoring the functional assessment of AGB's fourth grade teacher, Ms.  
7 Palomarez; and failing to fully consider the evidence relating to domains 1, 2, 3, 4,  
8 and 6. Because remand is required due to the ALJ's failure to have a qualified  
9 pediatrician or other specialist conduct a complete review of the record, the Court  
10 need not address Plaintiff's other arguments. However, on remand, the ALJ is to  
11 consider the report of Ms. Palomarez. Although this report is before the application  
12 filing date (and therefore before the alleged period of disability),<sup>49</sup> Ms. Palomarez's  
13

---

15 <sup>48</sup> 20 C.F.R. § 416.1444. *See also* 20 C.F.R. § 416.1453(c) (permitting the ALJ to  
16 issue his decision more than ninety days after the request for hearing is filed when  
17 there was good cause for extending the time period, such as when the claimant  
18 submits additional material evidence). *See also* AR 46-48 (letters from Plaintiff's  
19 law firm to ALJ seeking hearing decision after the ninety-day period expired).

20 <sup>49</sup> 20 C.F.R. § 416.335 ("When you file an application in the month that you meet  
21 all the other requirements for eligibility, the earliest month for which we can pay  
22 you benefits is the month following the month you filed the application.").

1 report contains significant information.<sup>50</sup> Ms. Palomarez interacted with AGB  
2 during each fourth-grade school day. AGB's capabilities and limitations during her  
3 fourth-grade year as set forth in Ms. Palomarez's report, which was written only  
4 six months before the disability application, was evidence the ALJ must consider.<sup>51</sup>  
5 In addition, on remand, if the ALJ discounts AGB's mother's testimony because  
6 AGB only began to receive special education support during her seventh-grade  
7 year, the ALJ must more meaningfully articulate this basis on this record. A record  
8 that reflects the mother's continuous attempts to seek special education services  
9 for her daughter and her eventual need to obtain outside guidance from the  
10 medical providers and social workers in order to navigate the school's special  
11 education system requirements. Also, the record reflects that AGB's learning  
12 disability limits her ability to perform tasks that require her to use her active-  
13 working memory—a skill that is relied on more in higher grades than in earlier  
14 elementary grades.

### 15 **C. Remand for Further Proceedings**

16 Plaintiff requests that the ALJ's decision be vacated. The decision whether  
17 to remand for further proceedings or immediately award benefits turns upon the  
18 likely utility of further proceedings.<sup>52</sup> Here, the Court finds that remand for further  
19

---

20 <sup>50</sup> 20 C.F.R. § 416.924a(a)(2)(iii).

21 <sup>51</sup> *Id.* § 416.912(b).

22 <sup>52</sup> *Barman v. Apfel*, 211 F.3d 1172, 1179 (9th Cir. 2000).

1 proceedings is required. The ALJ must call both a pediatrician (or other medical  
2 specialist) and a psychologist/psychiatrist to evaluate AGB's case in its entirety,  
3 and then re-evaluate whether AGB is disabled, including evaluating the report  
4 completed by Ms. Palomarez and reevaluating AGB's mother's testimony.

5 **V. Conclusion**

6 Accordingly, **IT IS HEREBY ORDERED:**

- 7 1. Plaintiff's Motion for Summary Judgment, **ECF No. 11**, is  
8 **GRANTED.**
- 9 2. The Commissioner's Motion for Summary Judgment, **ECF No. 12**, is  
10 **DENIED.**
- 11 3. The Clerk's Office shall enter **JUDGMENT** in favor of Plaintiff  
12 **REVERSING** and **REMANDING** the matter to the Commissioner of  
13 Social Security for further proceedings consistent with this  
14 recommendation pursuant to sentence four of 42 U.S.C. § 405(g).
- 15 4. The case shall be **CLOSED.**

16 **IT IS SO ORDERED.** The Clerk's Office is directed to file this Order,  
17 provide copies to all counsel, and close the file.

18 **DATED** this 13<sup>th</sup> day of March 2020.

19  
20 s/Edward F. Shea  
EDWARD F. SHEA  
21 Senior United States District Judge  
22  
23